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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of Tennessee at Knoxville

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the admission of a nontestifying accomplice's interlocking confession, on rebuttal, solely to impeach the defendant's false claim that his own statement was a coerced imitation of the accomplice's confession, violates the defendant's right to confrontation?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ:	
The Tennessee Court Of Criminal Appeals Er- roneously Found A Violation Of The Confronta- tion Clause In The Introduction Of An Ac- complice's Interlocking Confession For Impeach- ment Purposes	6
Conclusion	8
Appendix:	
A - Opinion of Tennessee Court of Appeals	A-1
B - Order of Supreme Court of Tennessee Denying Permission to Appeal	A-13

TABLE OF AUTHORITIES

	Page
Cases Cited:	
Bruton v. United States, 391 U.S. 123 (1968)	6,7
Harris v. New York, 401 U.S. 222 (1971)	8
Oregon v. Hass, 420 U.S. 714 (1975)	8
Parker v. Randolph, 442 U.S. 62 (1979)	6,7
State v. Elliott, 524 S.W.2d 473 (Tenn. 1975)	6
Other Authorities:	
Tenn. Code Ann. § 37-1-134(a)(1)	5
Tenn. Code Ann. § 39-2-202(a)	3
Tenn. R. App. P. 11	1
28 U.S.C. § 1257(3)	2
U.S. Const. amend VI	2

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of Tennessee at Knoxville**PETITION FOR WRIT OF CERTIORARI****OPINION BELOW**

The opinion of the Court of Criminal Appeals of Tennessee at Knoxville, not yet reported, was rendered on January 25, 1984. The opinion appears as Appendix A.

The order of the Supreme Court of Tennessee, denying discretionary review under Tenn. R. App. P. 11, was filed on April 30, 1984. It appears as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on January 25, 1984. Discretionary review was sought in the Supreme Court of Tennessee, and was denied on April 30, 1984. This petition was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

STATEMENT OF THE CASE

The victim, 72-year-old Ben Tester, was last seen alive walking toward his house in Hampton, Tennessee at about 8:45 p.m. on August 26, 1981. His body was found the next day, hanging by a nylon rope from an apple tree in his back yard. His house had been broken into through a front porch window and the house had been ransacked. A gag in Tester's mouth had apparently been torn from a sheet in the house.

Respondent Harvey J. "Joe" Street, a juvenile at the time of the murder, was transferred to criminal court to be tried as an adult and was indicted jointly with several others, including Clifford Peele. The indictment charged murder in the first degree in a single count which alleged both that the killing was premeditated and that it had been committed during the

perpetration of a felony.¹ Street's case was severed from those of the other defendants, and venue was changed to Unicoi County.

The State's chief evidence was a voluntary confession Street made to police on September 17, 1981.² The extremely detailed statement related that Street, Clifford Peele, and two other young men planned and executed the burglary of the victim's house. Street claimed that he had told Peele he would not "do his part" if the victim discovered them, but part of their joint plans included the purchase of nylon rope. Street admitted in the statement that he had willingly assisted in the burglary and ransacking of the house.

Street's statement described how Peele had jumped on and struggled with Tester when Tester surprised the burglars by walking into the house, and Street claimed that he then ran out of the house and told Peele they should leave. At the insistence of the other burglars, however, Street returned to the house and assisted by making a gag for the unconscious victim's mouth.

Finally, Street described in the statement how Tester had been carried out of the house, stood on the tailgate of a pickup truck,

¹ Tenn. Code Ann. § 39-2-202(a):

Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

² Street challenged the admissibility of the confession, but the Tennessee Court of Criminal Appeals held that the trial court's findings of a knowing waiver and voluntariness were supported by the record. Street did not appeal this issue to the Tennessee Supreme Court.

and hanged. Street said that he got up in the truck and watched the hanging, but he specified that the others had actually tied the rope to the tree, put the noose around Tester's neck, and pushed Tester off the tailgate.

Other proof presented by the State corroborated the confession, particularly by the subsequent condition of the crime scene, which was just as Street had described it. There was also proof of statements made by Street after the killing in which he admitted to knowing the location of certain physical evidence and in which he admitted placing the rope around the victim's neck.

Street attempted to set up an alibi defense. He testified that he spent the day with Peele, but was not with Peele that night and was not at the scene of the murder.

Street also recanted his confession, claiming that one of the officers present at its taking (the sheriff) had pressured Street to adopt verbatim a statement Clifford Peele had given the day before. Specifically, the sheriff would read a portion of Peele's statement and instruct Street to "say something similar to this." Street also claimed that he was angrily accused of "telling a damn lie" whenever Street's oral statements differed from Peele's written statement.

In rebuttal, the State introduced Peele's statement through the sheriff, who testified that he had not pressured Street in any way. Peele's statement also detailed Street's assistance in the planning and execution of the burglary. According to Peele, both he and Street jumped Tester and then ran outside, where a third burglar convinced them to help in the murder. All four burglars carried Tester out to the truck, and Street helped to stand Tester up and placed the rope around his neck.

The jury was twice instructed not to consider Peele's statement for its own truthfulness. The emphasis of the State's questioning of the sheriff was the existence of discrepancies between

the confessions. The State's references to Peele's statement during closing arguments were also carefully limited to its impeachment value.

The jury returned a general verdict of guilt of first-degree murder, without specifying whether it had relied on premeditation or felony murder. Because he was a transferred juvenile, Street could not receive a death sentence, Tenn. Code Ann. § 37-1-134(a)(1), and he therefore received an automatic life sentence.

In reversing Street's conviction, the Tennessee Court of Criminal Appeals agreed that Peele's statement was not hearsay, but held that its introduction nonetheless violated Street's right to confrontation. The state appellate court rejected the State's argument that the two confessions were "interlocking," holding that Peele's confession made Street "much more a principal actor" than had Street's own confession. The court also concluded that what it called the "Interlocking Confessions Doctrine" applied only to joint trials. Finally, the court refused to find harmless error.

REASONS FOR GRANTING THE WRIT

The Tennessee Court Of Criminal Appeals Erroneously Found A Violation Of The Confrontation Clause In The Introduction Of An Accomplice's Interlocking Confession For Impeachment Purposes.

The state appellate court has misapplied the Confrontation Clause as interpreted by the Court in *Bruton v. United States*, 391 U.S. 123 (1968), and *Parker v. Randolph*, 442 U.S. 62 (1979). Furthermore, this Court should take this opportunity to clarify the split decision in *Parker*, which left federal and state courts with a harmless error rule in the application of the Sixth Amendment. Therefore this Court should grant the writ of certiorari and review the issue presented in this case.

In *Bruton*, this Court held that the highly inculpatory confession of a nontestifying co-defendant should not have been admitted in a joint trial with the defendant, who had not confessed his participation in the crime. Although the trial judge in *Bruton* had instructed the jury to consider the confession only against the confessor, this Court held that instruction to be ineffective since the confession had been "devastating" to Bruton's defense and had added "substantial, perhaps even critical, weight to the government's case in a form not subject to cross-examination . . ." 391 U.S. at 128, 136.

In 1975 the Tennessee Supreme Court suggested that *Bruton* would not be violated unless the co-defendant's confession exposed the defendant to "an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment. . . ." *State v. Elliott*, 524 S.W.2d 473, 478 (Tenn. 1975). Because Elliott had confessed only to driving a second getaway car, however, and had denied being near the scene of the crime, the introduction of the co-defendant's inculpatory confession was held to be a harmless violation of *Bruton*.

This Court addressed the question of "interlocking" confessions in *Parker v. Randolph*, 442 U.S. 62 (1979). Four Justices¹ opined that *Bruton* is not violated by such a confession, reasoning that the co-defendant's confession is no longer "devastating" if the defendant has also confessed to participation in the crime. A fifth Justice, forming a majority, agreed only that the introduction of an "interlocking" confession was at most harmless error. 442 U.S. at 77-82 (Blackmun, J. concurring). Three Justices dissented, 442 U.S. at 81, and Justice Powell did not participate, 442 U.S. at 77.

The instant case is an excellent example of a lower court's misunderstanding of *Bruton* and confusion over the meaning of *Parker*. When respondent Street took the stand in his own defense, his claim of alibi had already been "devastated" by the introduction of his own detailed and highly reliable confession. By his own confession Street willingly assisted in burglarizing the victim's home, and at least aided and abetted the others in murdering the victim. He was therefore at least guilty of felony murder, which is first-degree murder and punishable (in Street's case) only by life imprisonment.

Peele's confession did nothing to increase the risk of conviction or higher punishment. Minor differences such as who actually placed the rope around Tester's neck were irrelevant, especially since Street presented an alibi defense and did not give the jury an option to find a reduced grade of homicide.

The lower court's decision is even more disturbing in that it allows a defendant to use the confrontation right to distort the truth-finding function of the criminal trial. Street will now be able to take the stand and make his false claim that he was forced to parrot Peele's confession, confident in the knowledge that

¹ Justice Rehnquist was joined by Chief Justice Burger, Justice Stewart, and Justice White.

the State will be unable to impeach him with the confession itself. For the same reasons that prearrest silence may be used to impeach a defendant, *Jenkins v. Anderson*, 447 U.S. 231 (1980), and that a *Miranda*-violated voluntary statement may be used for the same limited purpose, *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975), this Court should consider whether Peele's confession in this case was properly used solely to impeach Street's contrary testimony.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

**IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE, KNOXVILLE**

NOVEMBER 1983

No. 25

Unicoi Criminal

**State of Tennessee,
Appellee,**

V.

**Harvey J. Street,
Appellant.**

**Honorable Arden L. Hill, Judge
(First Degree Murder)**

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For the Appellant:

**Bill Hampton
Stuart Hampton
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REVERSED AND REMANDED

MARK A. WALKER, PRESIDING JUDGE

FILED: JAN. 25, 1984

OPINION

The appellant, Harvey G. Street, was convicted of first degree murder and sentenced to life imprisonment. The case is before us on delayed appeal after his earlier direct appeal had been dismissed because of Street's untimely notice of appeal.

The killing in this case occurred in Carter County on the night of August 26, 1981, about three months after Street's 17th birthday. After a hearing in the Carter County Juvenile Court, jurisdiction was transferred to criminal court for Street's trial as an adult.

The Carter County grand jury jointly charged Street and five others with the first degree murder of Ben W. Tester, both premeditated and in the perpetration of a burglary. Street's appointed counsel moved for a change of venue, and it was changed to Unicoi County. The trial court denied Street's motion to suppress evidence of his confession. Street's separate trial on July 19 - 22, 1982, resulted in his conviction.

On appeal Street presents two issues: (1) The court erred in holding that his confession was voluntary and admitting it into evidence. With this argument he also contends that he was denied the right to counsel; and (2) that he was denied his constitutional right to confront the witnesses against him by the admission into evidence of the out of court statement of Clifford Peele implicating him in the murder. We find that the case must be reversed on the second issue.

On August 27, 1981, Ben Tester was found dead, gagged and hanging by the neck from a tree in his yard in Hampton, Tennessee. A window screen had been cut, and the victim's home forcibly broken and entered. The house had been ransacked

and there appeared to have been a struggle between the victim and his assailants. Buttons from a shirt the victim had been wearing were scattered throughout the living room of the house, and the telephone wire had been cut. The victim's wallet was also found in the house, containing no money.

The defendant, who lived near the victim, and a number of others were questioned by officers in the three weeks after the murder to find if they had any information about the killing.

On September 17, 1981, the defendant called the sheriff from his grandmother's home to say that he wanted to make a statement. The sheriff sent a car for him and he made the statement in question. The sheriff showed him the statement of Clifford Peele that implicated the defendant in the murder.

In the defendant's detailed and lengthy statement given that night, he said that Peele had asked him about a good house to break in; that he had told Peele of Ben Tester's home because Tester had money and went to church and would be away from home. Peele, Eddie Montgomery, Jeff Causby and the defendant went to Tester's home in a stolen truck, broke in and ransacked the house. Tester, age 73, surprised them by returning before the burglary was complete. Peele threw him to the floor and took his wallet.

By the statement, the defendant said a number of times, "Cliff, let's go," but Peele said that they were going to "string him up." Peele got a rope and Montgomery agreed on the hanging. Because Montgomery threatened to whip him, the defendant tore a sheet; made a gag and put it in Tester's mouth. Montgomery tied the knot in the gag. Peele and Montgomery took Tester out and put him on a truck. Montgomery climbed an apple tree and put a rope over a limb; Peele tied the rope around Tester's neck. At this point Causby ran. Peele and Montgomery eased Tester off the tailgate, leaving him swinging from the tree. Peele, Montgomery and the defendant left in the truck.

Defendant recanted this confession the next day. A suppression hearing was conducted prior to trial in which the court found that the confession by defendant had been freely and voluntarily given. This confession was subsequently admitted into evidence at trial.

Defendant first contends that this statement given by him was rendered invalid by the circumstances surrounding its taking, and in a related argument he claims he was denied the right to counsel during rendition of the statement.

Testimony given at the suppression hearing indicated that the September 17th interrogation of defendant began at 9:27 p.m. and ended at approximately 1:30 a.m. Agents Don Collins and S. A. Sloan of the T.B.I. were present, as were Assistant Attorney General Lynn Brown and Sheriff George Papantoniou. As well, Juvenile Judge Jesse Ray arrived after defendant had given the statement, as it was being read by Agent Collins.

Prior to the interrogation, defendant's father signed a parental interrogation interview waiver that allowed the officers to talk to the juvenile defendant in his presence. He also signed the confession as a witness. Defendant claimed his father left after signing the waiver, although Collins, Brown and Papantoniou stated that defendant's father remained throughout the interrogation. We note that the father, M. B. Street, was not called at this hearing or at trial to support the allegations made by his son.

Defendant also signed a form waiving his *Miranda* rights prior to initiation of the interrogation, as well as signing the completed statement and acknowledging that it was true. He made a number of corrections in the statement before signing.

There is no question that defendant was distraught and cried at times during the interrogation. He also claims that the officers refused to allow his mother to attend the interrogation, although testimony indicated he actually requested that his mother not be there.

Assistant Attorney General Brown stated that he told defendant at least three times he was free to leave during the interrogation; Collins' testimony supported this. Defendant claimed that he asked to go home, but was told he could not until the statement was complete.

Defendant alleged that Sheriff Papantoniou had threatened to send him to jail the next morning if he refused to give a statement concerning the Tester murder. (Defendant had been convicted in juvenile court previously on an unrelated charge and was out on bail pending sentencing.) He said the sheriff also promised to make him a trusty at the county jail if he did confess. The sheriff denied these allegations; these denials were supported by Brown and Collins.

Defendant stated he was promised he could go home after the statement if he did confess and at least temporarily would not be arrested for the murder. The sheriff said he only promised to talk to the judge and Attorney General Brown about this. However, Brown testified that following the statement defendant was allowed to go home and was not arrested for the murder until some four to five days after that. Brown stated this was done because the defendant was already out on bond, there was little risk that he would leave the state, and they feared for his safety. The sheriff also said that he did not want to arrest anyone at that time for fear others would leave the state.

Defendant also claims to have been threatened with the electric chair upon conviction. All the other witnesses, however, stated that he was merely informed of the seriousness of the crime, although "death penalty" or "electric chair" may have been mentioned.

Defendant claimed the sheriff kept interrupting him during the interrogation, telling him he was lying. He said the sheriff at these times kept referring to the confession of Clifford Peele. Although the sheriff denied these allegations, Brown and Collins testified that the sheriff did interrupt, and that copies of the Peele confession were present during the interrogation.

Finally, defendant claims he requested that counsel be present, but was told by the sheriff that a lawyer would do him no good. This charge was denied by Papantoniou, Collins and Brown; Brown, in addition, remembered defendant specifically stating he did not want an attorney present. The defendant had signed a waiver of rights form that included a waiver of the presence of an attorney.

The court found after hearing the evidence that the confession was knowingly, voluntarily and intelligently given, and overruled the motion to suppress.

The voluntariness of a confession is to be determined from the totality of the circumstances surrounding the statement, considering the demeanor and credibility of the witnesses. *State v. Kelly*, 603 S.W.2d 726 (Tenn. 1980). Examining the suppression hearing record in this light, there is material evidence to support the finding of voluntariness by the trial judge. This finding has the weight of a jury verdict, and as such, this court is bound to accept that determination. *State v. Adams*, 631 S.W.2d 392 (Tenn. 1982); *State v. Kelly*, *supra*, at 729.

This same "totality of the circumstances" approach is used to determine if there has been an effective waiver of counsel. *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). The written waiver of right to counsel, supported by General Brown's testimony that defendant stated he did not want counsel present, are sufficient to support the implicit finding of effective waiver of counsel. These two issues on the admissibility of the confession are without merit.

Defendant next contends that introduction of Clifford Peele's confession implicating him in the homicide without Peele's presence at trial violated defendant's right to confront the witnesses against him.

At trial, defendant relied on an alibi defense. Testifying in his own behalf, he denied the validity of his September 17th confes-

sion, saying that Sheriff Papantoniou read Clifford Peele's confession to him a number of times and told him to "say the same thing similar to this." Defendant claimed that whenever he made a statement differing from Peele's confession the sheriff would tell him he was lying and then would "read Peele's statement back and I'd say yeah that's right."

The state called Sheriff Papantoniou as a witness during rebuttal testimony in an attempt to introduce a written copy of the Peele confession, as well as have him orally recite the confession to the jury. The state's position was and is that the confession was not introduced to prove the truth of matters asserted therein. Rather, the confession was used to rebut defendant's allegation that his statement was derived from Peele's. This was done by pointing out specific references to the scene of the crime in defendant's statement that were absent in Peele's. Since the confession was being used for this nonhearsay purpose, the state argues that there was no confrontation problem. No attempt was made by the state to call Peele as a witness, nor to redact portions of the Peele confession implicating defendant in the homicide. Peele was in the Unicoi County Jail near the courthouse. The trial judge after some deliberation admitted the confession into evidence over defendant's objection. He cautioned the jury to consider the confession for rebuttal purposes only and reiterated this caution during the jury charge.

We agree with the state that the Peele confession as used at trial was not hearsay within traditional rules of evidence. See Paine, *Tennessee Law of Evidence*, §47 (1974). However, defendant's confrontation rights are not foreclosed merely because the confession as admitted did not constitute hearsay. While hearsay rules and the Confrontation Clause are generally designed to protect similar values, the overlap between the two is not complete. *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Jones*, 598 S.W.2d 209 (Tenn. 1980).

In this case, while admission of the confession was not technically used to prove its truth, the state in actuality placed before the jury testimony incriminating the defendant, made by one not available for cross-examination.

In *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the petitioner's accomplice, Loyd, had previously been convicted. The prosecution called him as a witness at petitioner's trial, where he invoked his privilege against self-incrimination. The prosecution then produced a confession signed by Loyd, and under the guise of refreshing his collection, read aloud this confession implicating the petitioner. Every few sentences he would ask if these statements were true and Loyd would reassert his privilege. Afterwards, law enforcement officers were called to the stand and verified that the document read from was indeed Loyd's confession. This document was never formally offered into evidence. The Supreme Court reversed petitioner's conviction based on a violation of his right to confrontation. They noted that while the prosecutor's reading of the alleged confession was not technically hearsay, it "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true."

Here, the alleged confessor was not even called to the stand. Those statements inculcating the defendant stood basically unchallenged as the state directed inquiry not to those allegations but to the factual statements surrounding the scene of the crime. The implication was left that the confession was a true rendition of events on the night of the homicide. This situation was compounded by introducing into evidence a written copy of the confession without any attempt to remove references directly linking defendant to the homicide. There can be no doubt that admission of this confession for any purpose constitutes a denial of defendant's fundamental right to cross-examine those witnesses

against him. In Tennessee, cross-examination is not limited to the subject matter dealt with directly, but extends to any matters material to the lawsuit. See *Long v. State*, 607 S.W.2d 482 (Tenn.Cr.App. 1980). Had Peele been present, defendant could have challenged his accusations as well as the authenticity of the confession. He was not given this opportunity.

This court recognizes that the right to confront and cross-examine witnesses against one is not absolute, and may in certain cases bow to other legitimate interests in the criminal trial process. However, whenever this occurs it calls into question the "ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

A close examination of the circumstances surrounding admission of this confession into evidence without calling the confessor to the stand reveals no valid state interest that is served. Although Peele was in jail awaiting trial when the confession was introduced, the state made no effort to call him to testify. Nor was an effort made to limit prejudice to the defendant by redacting incriminating portions of the confession. From an examination of the confession, this could have done without detracting from the alleged purpose for which the confession was introduced. One cannot help but conclude that introduction of this unedited confession was merely a transparent attempt to condemn defendant from another source without allowing the veracity of the source or the confession to be tested by cross-examination.

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), petitioner Bruton and his co-defendant Evans were convicted after a joint trial. Although neither defendant testified, an oral confession made by Evans implicating Bruton was introduced at trial. The trial court cautioned the jurors that Evans' confession should be disregarded

in determining the guilt or innocence of Bruton. The Supreme Court reversed Bruton's conviction, holding that at a joint trial where neither defendant testifies, admission of one codefendant's confession inculcating the other violates his right to cross-examination secured by the Confrontation Clause. The court determined that this was true notwithstanding the cautioning instructions given by the trial judge.

The state places great reliance on the "Interlocking Confessions Doctrine" set forth in *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). This doctrine is purported to create an exception to the *Bruton* rule. In *Parker* four members of the court held that the introduction of a codefendant's confession at a joint trial where he does not testify will seldom, if ever, violate the Confrontation Clause if the defendant himself has confessed to participation in the crime. A fifth member of the court, creating a majority, reasoned that any *Bruton* error caused by introduction of this interlocking confession was harmless beyond a reasonable doubt. See also *State v. Elliott*, 524 S.W.2d 473 (Tenn. 1975).

We first note that a common thread running through cases involving nontestifying codefendant confessions and resulting confrontation problems is their use at joint trials. In these trials, policy arguments favoring judicial economy and efficiency allow admission against the confessor. However, these same policy arguments favor limiting instructions by the trial judge and redaction if possible, to avoid prejudice to the other defendant. This court can find no case that has allowed introduction of one codefendant's confession at a severed trial against the other defendant without calling that available confessor to testify.

In Tennessee when jointly tried codefendants have confessed and their confessions are similar in material aspects, the *Bruton* rule does not apply. *State v. Elliott*, *supra*, p. 477, 478. The implication is that for the "Interlocking Confessions Doctrine" to apply there must be a joint trial. However, assuming that this doctrine were applicable to severed trials, if:

"(T)he confession of one non-testifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other non-testifying codefendant, so as to expose the latter to an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment, the latter codefendant is entitled to test the veracity of the statements in the confession of his codefendant. A denial to him of his right through the failure of his codefendant to take the stand brings the *Bruton* rule into play." *State v. Elliott*, *supra*, at 478.

In the present case, Peele's confession made the defendant much more a principal actor in the burglary and hanging than the defendant's September 17th confession did. In his confession the defendant said that he kept telling Peele to leave after they had robbed Tester but that Peele insisted on the hanging; that defendant did not actually participate in the hanging. Peele's confession said that both he and the defendant placed the rope around Tester's neck. Where each confessor endeavors to place responsibility for the homicide on the other defendant, then the confessions do not interlock. *State v. Robinson*, 622 S.W.2d 62 (Tenn.Cr.App. 1980).

Likewise, the trial judge's caution to the jury not to consider Peele's statement as proof of defendant's guilt was ineffective to correct denial of defendant's right of confrontation. This is especially true when the confession directly charges defendant with the murder, describing his role in the killing in great detail. See *Stallard v. State*, 187 Tenn. 418, 215 S.W.2d 807 (1948). In the context of this case, we feel that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury cannot be ignored." *Bruton v. United States*, *supra*, 391 U.S. at 195, 20 L.Ed.2d, at 485.

Of course, where proof of defendant's guilt is overwhelming and it appears beyond a reasonable doubt that the confrontation violation had no effect on the verdict, we recognize the er-

ror may be considered harmless. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *State v. Elliott, supra*, at 478; *Alexander v. State*, 562 S.W.2d 207 (Tenn.Cr.App. 1977). After careful study, we are unable to say that this is true in the case before us. Peele's statement not only implicated the defendant, it alone could establish all essential elements of the homicide, had the jury chosen to believe defendant's confessions were in fact involuntary. Defendant is entitled to a new trial free of this constitutional error.

Reversed and remanded.

/s/ Mark A. Walker,
Presiding Judge

CONCUR:

/s/ Joe D. Duncan, Judge

/s/ Jerry Scott, Judge

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
UNICOI CRIMINAL

State of Tennessee,
Appellant,
VS

Harvey J. Street,
Appellee.

**IN RE: APPLICATION FOR PERMISSION TO APPEAL
OF STATE OF TENNESSEE**

Upon consideration of the application for permission to appeal and brief in support thereof of the State of Tennessee, the opinion of the Court of Criminal Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM